MOHD ISHA AWANG v. MOHAMAD IDRIS SERAMAL BARIS

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
ABU BAKAR JAIS JCA
GUNALAN MUNIANDY JCA
[CIVIL APPEAL NO: P-02(NCVC)(W)-2426-12-2018]
5 AUGUST 2020

TORT: *Enticement – Claim for – Plaintiff alleged first defendant enticed his wife from matrimonial home causing breakdown of familial relationship – Whether there was valid marriage between plaintiff and wife – Whether there was order for judicial separation (faraq) from Syariah Court – Whether documents produced in court issued by Government department – Whether documents showed judicial and official acts had been performed – Whether Order of Syariah Court of Appeal adjudicating marriage between plaintiff and wife not valid according to 'syarak' made within court's powers – Whether documents proved marriage between plaintiff and wife dissolved by judicial separation – Whether presumption under s. 114(e) of Evidence Act 1950 applicable to documents – Whether claim for enticement ought to fail*

EVIDENCE: *Documents – Judicial separation – Order of – Whether there was valid marriage between plaintiff and wife – Whether there was order for judicial separation (faraq) from Syariah Court – Whether documents produced in court issued by Government department – Whether documents showed judicial and official acts had been performed – Whether Order of Syariah Court of Appeal adjudicating marriage between plaintiff and wife not valid according to 'syarak' made within court's powers – Whether documents proved marriage between plaintiff and wife dissolved by judicial separation – Whether presumption under s. 114(e) of Evidence Act 1950 applicable to documents*

FAMILY LAW: *Judicial separation – Documents – Whether there was an order for judicial separation (faraq) from Syariah Court – Whether documents produced in court issued by Government department – Whether documents showed judicial and official acts had been performed – Whether Order of Syariah Court of Appeal adjudicating marriage between plaintiff and wife not valid according to 'syarak' made within court's powers – Whether presumption under s. 114(e) of Evidence Act 1950 applicable to documents – Whether documents proved marriage between plaintiff and wife dissolved by judicial separation*

The respondent ('plaintiff') alleged that the appellant ('first defendant') had enticed his wife, the second defendant, away from the matrimonial home and had caused a breakdown of his familial relationship with the second defendant, causing the plaintiff to suffer losses and emotional distress. The plaintiff claimed against the defendants for general damages, special damages, aggravated damages and exemplary damages under the law of torts. The

defendants contended that there was no valid marriage between the plaintiff and the second defendant due to an order for judicial separation (*faraq*) granted in 1993 by the Syariah Court in Kedah. The first defendant had filed a counterclaim against the plaintiff, claiming that the contents of a letter sent by the plaintiff to several individuals regarding the first defendant, were untrue and defamatory of him and had caused his reputation to be in disrepute. The High Court, however, found that the evidence of DW2 was most crucial and that DW2 himself had no means to authenticate the documents which he had examined and in the circumstances, the court could not attach much weight to those documents to prove that the marriage had in fact been so dissolved by judicial separation against the undisputed fact that both the plaintiff and the second defendant were legally married in the year 1992. The Judicial Commissioner ('JC') was also of the considered view that the presumption under s. 90 of the Evidence Act 1950 ('Evidence Act') could not avail the defendant because it had not been shown that those documents were produced from the proper custody of DW2 since DW2 himself confirmed that the record had been disposed of and that he merely examined the documents produced by the second defendant of which he had no means to ascertain if they are in fact genuine documents. The JC made the finding that there was no satisfactory evidence to show that the marriage between the plaintiff and the second defendant had been dissolved by judicial separation. On the balance of probabilities, the High Court held that the plaintiff had succeeded in proving his case against the defendants for the alleged enticement. The High Court allowed the plaintiff's claim and awarded the plaintiff nominal damages but disallowed plaintiff's claim for exemplary damages. The first defendant's counterclaim was dismissed. Aggrieved, the first defendant appealed. The first defendant argued that the documents produced in court were made and issued by public officials in the course of their judicial and official acts and since those documents were admitted and marked as exhibits, the court may presume the existence of facts in relation to the case. The first defendant submitted that had the JC invoked the presumption under s. 114(e) of the Evidence Act, he would have arrived at a correct decision and hold that the marriage between the plaintiff and the second defendant had been dissolved by judicial separation. It was the first defendant's case that the plaintiff's claim that the first defendant had enticed his wife should fail.

Held (allowing appeal with costs; setting aside order of High Court)
Per Kamaludin Md Said JCA delivering the judgment of the court:

(1) The documents which have been the subject matter of scrutiny by the court were: exh. D41, the judgment or Order by the Syariah Court of Appeal in Kedah which pronounced the marriage between the plaintiff

and the second defendant as not valid according to 'syarak'; D44 which was the letter from the Chief Registrar of the Syariah Judicial Department of Kedah to the second defendant confirming that the Order of Syariah of Court of Appeal was a valid order; and D42 which was the extract of marriage certificate (Borang 22) between the plaintiff and the second defendant which contained an endorsement at the bottom of the page stating that the marriage 'telah difaraqkan' (D45) by the Kadi Daerah Balik Pulau in compliance with the Order of the Syariah Court of Appeal. Where a document has been properly tendered in evidence and marked as an exhibit, the court must give its due consideration. If the admissibility of the documents is not an issue and marked as exhibits, it rendered the documents as valid and the contents as proved. The contents stated therein were true and became undisputed facts. The facts in the documents showed that the marriage between the plaintiff and the second defendant had been dissolved by judicial separation. (paras 17-19)

(2) If the Syariah Court Order was accepted as valid, there was no reason to dispute its authenticity merely because the record of the original documents had been disposed of. Where a dispute arose as to the endorsement (D45) in the extract of the marriage certificates (D42), the JC may enquire the presence of such endorsement to satisfy himself. Had he done this, he would have found that the endorsement was entered based on the Order of the Syariah Court of Appeal (D41) as to which he had no issue on its validity. The original marriage certificate for D42 with the endorsement (D45) may not be in the possession or custody of DW2, however, it did not mean the court must totally shut its door to other supporting documents which could establish the history of the case. (paras 22 & 24)

(3) The documents issued by the relevant authorities were in fact documents issued by a Government department. The documents showed the judicial and official acts which had been performed. It is trite law that the court may presume the existence of any fact which it thinks likely to have happened in relation to the facts of the particular case that judicial and official acts had been regularly performed. In the circumstances, the presumption under s. 114(e) of the Evidence Act was applicable to those documents. (paras 28 & 29)

(4) The Order of Syariah Court of Appeal (D41) adjudicating that the marriage between the plaintiff and the second defendant was not valid according to 'syarak' must be presumed to have been made within the court's powers and was valid until proved otherwise. There was no evidence to suggest that the Syariah Court of Appeal Order was a fraudulent document or had been falsified. The Order remained valid

until set aside. Further, the letter from the Syariah Judicial Department (D44) confirming the validity of D41 and supported by D40 must be presumed to have been properly issued by the officer of the department and the endorsement made in the marriage certificate of the plaintiff and the second defendant that the marriage had been dissolved (difaraqkan) based on the decision of the Syariah Court of Appeal must be presumed to have been properly issued by the officer having such power to make such endorsement following the process. Thus, all this showed the existence of a fact which was likely to have happened which the court may presume by invoking s. 114(e) of the Evidence Act. (paras 31 & 32)

(5) Exhibit D42 which contained the endorsement that the marriage between the plaintiff and the second defendant had been dissolved (difaraqkan) (D45) was a certified true copy. Where the mode of proof in respect of a document tendered as irregular or insufficient in the sense that it had been erroneously allowed to be proved in a manner different from which the law required without objection, such objection could not be taken at the appellate stage. The rationale underlying the rule is that the failure to object amounts to a waiver of the objection to the admissibility of the document. It amounted to an implied admission of the objection waived. An implied admission amounted to an express admission within the meaning of s. 58 of the Evidence Act. Thus, there was sufficient evidence to show that the marriage between the plaintiff and the second defendant had been dissolved by judicial separation 'di mufaraqkan' on 20 October 1993 based on the order of the Syariah Court of Appeal dated 24 August 1993. (paras 33 & 34)

Case(s) referred to:

Commissioners of the Municipality of Malacca v. Sinniah [1970] 1 LNS 22 HC ***(refd)***
Dow Jones Publishing Company (Asia) Inc v. Attorney General [1989] 1 LNS 31 CA ***(refd)***
Ho Hong Bank Ltd v. Ho Kai Neo [1932] MLJ 76 ***(refd)***
Kaliammal Sinnasamy v. Majlis Agama Islam Wilayah Persekutuan (JAWI) & Ors [2011] 2 CLJ 165 CA ***(refd)***
Loo Keck Leong v. PP [1992] 3 CLJ 1332; [1992] 1 CLJ (Rep) 195 SC ***(refd)***
Mohd Nazir Badar Shair v. Timbalan Menteri Dalam Negeri & Ors [2000] 2 CLJ 805 HC ***(refd)***
Rengasamy Pillai v. Comptroller of Income Tax [1970] 1 LNS 139 FC ***(refd)***
Syarikat Jengka Sdn Bhd v. Abdul Rashid Harun [1980] 1 LNS 125 FC ***(refd)***
Yeak Chie Chai v. Gan Bee Aik [1983] 1 LNS 51 HC ***(refd)***
Zainal Kuning & Ors v. Chan Sin Mian Michael & Anor [1996] 3 SLR 121 ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 35, 58, 74, 78, 90, 114(e)

Other source(s) referred to:

Augustine Paul, *Evidence, Practice and Procedure,* 4th edn, pp 427-428, 659, 727-728, 908

For the appellant - Burhanudeen Abdul Wahid; M/s Burhan & Co
For the respondent - Imran Mohd Farok & Roshidah Osman; M/s Roshidah Osman & Partners

[Editor's note: Appeal from High Court, Pulau Pinang; Civil Suit No: PA-22NCVC-75-04-2016 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Kamaludin Md Said JCA:

Introduction

[1] The appellant is the first defendant whereas the respondent is the plaintiff in an action brought by the plaintiff against the first and the second defendants in the High Court at Penang.

[2] The plaintiff alleges that the first defendant had enticed his wife, the second defendant away from the matrimonial home and had caused a breakdown of his familial relationship with the second defendant causing the plaintiff to suffer losses and emotional distress. The plaintiff claims against the defendants for general damages, special damages, aggravated damages and exemplary damages under the law of torts.

[3] The plaintiff married the second defendant on 27 February 1992 and up to 7 May 2015, the second defendant left the matrimonial home and as of the date of trial, she had not returned. The first defendant is an associate professor at the Universiti Utara Malaysia.

[4] The defendants contended that there was no valid marriage between the plaintiff and the second defendant due to an order for judicial separation (*faraq*) granted in 1993 by the Syariah Court in the State of Kedah. The first defendant had filed a counter-claim against the plaintiff. The plaintiff wrote a letter dated 15 August 2015 to the then Minister of Higher Education which alleged that the first defendant had enticed and cohabited with his wife, the second defendant. The letter was copied to (i) the Secretary-General of the Ministry of Higher Education, (ii) the Director General of the Ministry of Higher Education Department and (iii) the Vice-Chancellor of the Universiti Utara Malaysia. The first defendant claims that the contents of the letter are not true and defamatory of him and had caused his reputation to be in disrepute.

[5] The High Court allowed the plaintiff's claim and awarded the plaintiff nominal damages in the sum of RM1,000 with RM20,000 costs subject to allocator whereas plaintiff's claim for exemplary damages was not allowed. The first defendant's counterclaim was dismissed with RM10,000 cost subject to allocator.

[6] Aggrieved by the said decision of the High Court, the first defendant appealed to the Court of Appeal.

The Decision Of High Court

[7] The learned JC was of the considered view that the evidence of DW2 is most crucial. The learned JC found that DW2 himself had no means to authenticate the documents which he had examined and in the circumstances, the court could not attach much weight to those documents to prove that the marriage has in fact been so dissolved by judicial separation against the undisputed fact that both the plaintiff and the second defendant are legally married in the year 1992.

[8] The learned JC was also of the considered view that the presumption under s. 90 of the Evidence Act 1950 could not avail the defendant because it has not been shown that those documents are produced from the proper custody of DW2 since DW2 himself confirms that the record has been disposed of and that he merely examined the documents produced by the second defendant of which he has no means to ascertain if they are in fact genuine documents.

[9] Based on the aforesaid, the learned JC made the finding that there is no satisfactory evidence to show that the marriage between the plaintiff and the second defendant had been dissolved by judicial separation (*faraq*). On the balance of probabilities, the court found that the plaintiff has succeeded in proving his case against the defendants for the alleged enticement.

[10] In respect of damages, the learned JC found that the plaintiff had failed to prove that he had suffered losses and emotional distress arising out of the said enticement. The court awarded nominal damages of RM1,000 to the plaintiff with RM20,000 costs subject to allocator.

[11] The learned JC concluded that the first defendant's counterclaim for defamation is dependent on whether or not the plaintiff's claim could succeed. If the plaintiff succeeds in his claim, then the letter written by the plaintiff could not be defamatory on the first defendant on the basis of justification. Having found in favour of the plaintiff, the learned JC dismissed the first defendant's counterclaim with cost of RM10,000 subject to allocator.

The Grounds Of Appeal

[12] In the memorandum of appeal, the first defendant states that the learned JC has misdirected himself in fact and in law:

(i) by allowing the plaintiff's claim and dismissing the first defendant's counterclaim;

(ii) when he made the finding that the plaintiff has proven his claim on the balance of probabilities against the first defendant;

(iii) when he failed to take into account and give due consideration to the fact that the plaintiff and the second defendant were lawful husband and wife at the time of the alleged tort of enticement;

(iv) in failing to take into account and give due consideration to the order for judicial separation between the plaintiff and the second defendant issued by the Syariah Court of Appeal in the State of Kedah Darul Aman (D41);

(v) in failing to take into account and give due consideration to the fact that the Chief Registrar of the Syariah Judicial Department Negeri Kedah Darul Aman had confirmed that D41 is a valid document issued by the Syariah Court of Appeal in the State of Kedah Darul Aman (D44);

(vi) by compelling or putting the burden on the first defendant to call the Judges of Syariah Court of Appeal in the State of Kedah Darul Aman as the maker of D41 to give evidence for the purpose of confirming D41 and its contents; and

(vii) when he made the finding that the elements of the tort of enticement were present even though the evidence by the second defendant and the first defendant that the second defendant left the house on her own free will was never challenged during cross-examination to prove that the first defendant had enticed the second defendant.

The Appeal

[13] We heard the appeal where parties presented their oral submissions and also relied on their written submissions.

[14] The first defendant raised a pertinent point that the presumption under s. 114(e) of the Evidence Act 1950 (EA) which says that the court may presume that judicial and official acts have been regularly performed applies to the documents produced in court. He argued that those documents were made and issued by public officials in the course of their judicial and official acts. Since those documents were admitted and marked as exhibits, the court may presume the existence of facts in relation to the case. The first defendant submitted that had the learned JC invoked the presumption under s. 114(e) of the EA, he would have arrived at a correct decision and held that the marriage between the plaintiff and second defendant had been dissolved by judicial separation (*faraq*). Therefore the claim by the plaintiff that the first defendant has enticed his wife (the second defendant) should fail.

[15] We considered the submissions and after careful reading of the record of appeal and the grounds of judgment of the learned JC, we found there is an appealable error in the decision of the learned JC that merits intervention by this court. It is our unanimous decision that the first defendant's appeal ought to be allowed. The decision of the learned judge is set aside. We award

costs of RM15,000 to the first defendant subject to allocator. The case is sent back to the High Court for assessment of damages in respect of the first defendant's counterclaim.

The Decision Of This Court

[16] Paragraph 58 of the learned JC's grounds of judgment referred by the first defendant reads as follows:

> ... [58] *The admissibility of the documents referred by the defendant to show that the marriage between the plaintiff and 2nd defendant has been dissolved by judicial separation (faraq) is not in issue.* However, in considering to the weight to be given to those documents in light of the extract dated 06-01-2017 of the marriage [Exhibit P33] and the marriage certificate [Exhibit P32] which both do not bear the dissolution of marriage (*faraq*) endorsement, I am of the considered view that the evidence of DW2 is most crucial. It is clear that DW2 had no means to authenticate the documents which he had examined and, in the circumstances, I could not attach much weight to those documents to prove that the marriage has in fact been so dissolved by judicial separation against the undisputed fact that both the plaintiff and 2nd defendant are legally married in the year 1992 ... – (at page 44 of the Appeal Record). (emphasis added)

[17] It is trite law that where a document has been properly proved, it must be marked as an exhibit. The documents which have been admitted need not be proved (see s. 58 of the EA). Where a document has been properly tendered in evidence and marked as an exhibit, the court must give its due consideration (see *Yeak Chie Chai v. Gan Bee Aik* [1983] 1 LNS 51; [1984] 1 MLJ 305).

[18] In the present case, the learned JC has clearly stated that the admissibility of documents referred to by the defendants to show that the marriage between the plaintiff and second defendant has been dissolved by judicial separation (*faraq*) is not an issue. In our view, if the admissibility of the documents is not an issue and marked as exhibits, it renders the documents as valid and the contents as proved. In such a case, the court must give due consideration to the same. The contents stated therein are true and become undisputed facts. The facts in the documents show that the marriage between the plaintiff and second defendant had been dissolved by judicial separation (*faraq*).

[19] We now examine the documents which have been the subject matter of scrutiny by the court. The documents are: exh. D41, the judgment or order by the Syariah Court of Appeal in the State of Kedah Darul Aman No. 21/92 dated 24 August 1993 which pronounced the marriage between the plaintiff and second defendant is not valid according to "*syarak*"; D44 which is the letter from the Chief Registrar of the Syariah Judicial Department Negeri Kedah Darul Aman dated 26 April 2017 to the second defendant confirming that the order of the Syariah Court of Appeal No. 21/92 dated

24 August 1993 is a valid order; and D42 which is the extract of marriage certificate (Borang 22) between the plaintiff and the second defendant which contains an endorsement at the bottom of the page stating that the marriage "telah difaraqkan" (D45) by the Kadi Daerah Balik Pulau on 20 October 1993 in compliance with the order of the Syariah Court of Appeal. (See pp. 69, 76-77 and 78 of the common bundle of documents).

[20] We noted that all those documents mentioned above show that the marriage between the plaintiff and the second defendant has been dissolved by judicial separation (*faraq*). What was troubling the learned JC was the fact that DW2 could not confirm the authenticity of the extract of the marriage certificate between the plaintiff and the second defendant produced by the latter which contains an endorsement stating that the marriage "telah difaraqkan" (D45) by the Kadi Daerah Balik Pulau on 20 October 1993. In the absence of the original record, the learned JC was of the view that the extract of the said marriage certificate dated 6 January 2017 (P33) and the marriage certificate (P32) produced by the plaintiff which both do not bear the dissolution of marriage (*faraq*) are considered valid and undisputed. In the circumstances, he could not attach much weight to those documents produced by the second defendant to prove that the marriage had in fact been dissolved by judicial separation as against the undisputed fact that both the plaintiff and the second defendant were legally married in the year 1992.

[21] Further, the learned JC was of the view that the presumption under s. 90 of the EA is not available to the defendants because those documents are not under the custody of DW2 since DW2 himself confirms that the record had been disposed of and that he merely examined the documents produced by the defendants of which he had no means to ascertain if they are in fact genuine documents. The learned JC concluded that there was no satisfactory evidence to show that the marriage between the plaintiff and the second defendant had been dissolved by judicial separation (*faraq*).

[22] The learned JC held that the finding is not a finding as to the validity of any order issued by Syariah Court but only to the extent of the weight to be attached to the documents purportedly issued by the relevant authorities (at p. 59 of the judgment). It is quite difficult for us to appreciate this statement but we can only assume that the learned JC was not disputing that the Syariah Court order is a valid order. In our view, if the order is accepted as valid, there is no reason to dispute its authenticity merely because the record of the original documents had been disposed of. The learned JC only focused his mind on the marriage certificate produced by the plaintiff (exh. P33 at p. 89 of the common agreed bundle) and the extract of the marriage certificate (exh. P32 at p. 91 of the common agreed bundle) which both do not bear the dissolution of marriage (*faraq*) without considering the contents found in D42, which is the certified copy of the extract of the marriage

certificates (p. 69 of the common agreed bundles) produced by the defendants. The endorsement at the bottom of the page of D42 clearly states that the marriage between the plaintiff and the second defendant "telah difaraqkan" which has been marked as D45.

[23] The endorsement states that the "Perkahwinan Telah Difaraqkan Oleh Kadi Daerah Balik Pulau Pada 20 October 1993 Berdasarkan Keputusan Mahkamah Rayuan Syariah Negeri Kedah (Rujukan Kami: Bil (2) DLM.JUPP/KB/1/001/JLD.3, bertarikh 6 Januari 1994". It is very clear that the endorsement was made in compliance with the Syariah Court order. The said order dated 24 August 1993 has also been produced and marked as D41. The learned JC also seems to have ignored other supporting documents. The exh. D40 dated 6 November 1993 clearly states that Pejabat Kadi Daerah Barat Daya Pulau Pinang has on 20 October 1993 ordered the marriage to be dissolved "difaraqkan" based on the order of the Syariah Court of Appeal (D41).

[24] We are of the view that in circumstances where a dispute arises as to the endorsement (D45) in the extract of marriage certificates (D42), the learned JC may enquire the presence of such endorsement, to satisfy himself. Had he done this, he would have found that the endorsement was entered based on the order of the Syariah Court of Appeal (D41) as to which he had no issue on its validity. It is prudent for the learned JC to have considered all the documents produced before him in light of the dispute to ascertain whether the marriage had in fact been dissolved by judicial separation. The original marriage certificate for D42 with the endorsement (D45) may not be in the possession or custody of DW2, however, in our view, it does not mean the court must totally shut its door to other supporting documents which can establish the history of the case. It is not disputed that the documents are dated between 1992 and 1993 hence, it is possible for DW2 not being able to confirm without the benefit of the original record. For documents of this nature, after lapse of years, it would be impossible to give evidence that the statements contained therein are true.

[25] We are also of the view that the consistency of the matter would also depend on the oral evidence given by witnesses. During the cross-examination, the plaintiff said that he knew that the second defendant's father had filed an action at the Syariah Court to dissolve the marriage (See p. 148 line 22-28, Rekod Rayuan-Jilid 2-Bahagian B). The defendants' witness, SD1 (the Chief Registrar of the Syariah Department) during cross-examination said that he made enquiries on the validity of the order of the Syariah Court of Appeal (D41) (See p. 344 line 19-30 Rekod Rayuan-Jilid 3-Bahagian B). SD1 further said that during his tenure as the Chief Registrar, there was no incident of the court order having been falsified (See p. 356 line 15-20 Rekod

Rayuan-Jilid 3-Bahagian B). The learned JC has also acknowledged DW2's evidence who had seen D41 and confirmed the signatures of the Syariah Court of Appeal judges who made the order.

[26] The first defendant has submitted that by questioning the authenticity of D41 and requiring the maker to come forward to give evidence, the learned JC has placed too heavy burden on the first defendant as if to attempt to go beyond the Syariah Court of Appeal order. He relied on the case of *Kaliammal Sinnasamy v. Majlis Agama Islam Wilayah Persekutuan (JAWI) & Ors* [2011] 2 CLJ 165 where YA Abdul Wahab Patail JCA said as follows:

> [12] Reverting to the issue at hand, a Syariah High Court has the power to hear and decide to make a declaration as to the status of a person as a Muslim. It is the court of competent jurisdiction for that purpose. This is established in *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ 77 (Rep) SC; *Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 2 CLJ 5 FC; *Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain* [2007] 3 CLJ 557 FC. In the light of these cases, *Ng Wan Chan* (*supra*) is no longer authority.
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> [13] As held in *Nor Kursiah Baharuddin v. Shahril Lamin & Anor* [1997] 1 CLJ Supp 599 HC and approved in *Kamariah Ali lwn. Kerajaan Negeri Kelantan, Malaysia & Satu Lagi dan Rayuan Yang Lain* [2002] 3 CLJ 766 CA, it is not for the civil court to go behind that order of the court of competent jurisdiction to question the merits of the matter decided upon by that court. It is therefore not for the civil court to look behind the order and say whether the Syariah High Court acted correctly or not and to interfere with its decision ...

[27] We may add that a judgment of the court is a public document under s. 74 of the EA (see *Zainal bin Kuning & Ors v. Chan Sin Mian Michael & Anor* [1996] 3 SLR 121 (CA). In *Syarikat Jengka Sdn Bhd v. Abdul Rashid Harun* [1980] 1 LNS 125; [1981] 1 MLJ 201 (FC), where it was held that the absence of the author of a public document under ss. 74 and 78 of the EA from giving evidence does not in any way affect its admissibility. Those documents are relevant public records made in the performance of a public duty under s. 35 of EA. Thus they are admissible as an exception to the hearsay rule (see *Evidence, Practice and Procedure*, 4th edn, Augustine Paul at pp. 427-428).

[28] The learned JC says that his finding is only to the extent of the weight to be attached to the documents purportedly issued by the relevant authorities. In our view, had the learned JC applied his mind properly, he would have noticed that those documents issued by the relevant authorities are in fact, documents issued by a Government department. The documents show the judicial and official acts which have been performed. It is trite law

A that the court may presume the existence of any fact which it thinks likely to have happened in relation to the facts of the particular case that judicial and official acts have been regularly performed (see s. 114(e) of EA). The words "regularly performed" means correctly done (see *Commissioners of the Municipality of Malacca v. Sinniah* [1970] 1 LNS 22; [1974] 1 MLJ 77). The B section also states that the court is required to have regard to the fact that 'judicial act, the regularity of which is in question was performed under exceptional circumstances'. Once the presumption arises, the official act will be presumed to have been regularly done until the contrary is proved (see *Evidence, Practice and Procedure,* 4th edn, Augustine Paul at p. 908). Peh Swee C Chin in *Loo Keck Leong v. PP* [1992] 3 CLJ 1332; [1992] 1 CLJ (Rep) 195; [1992] 2 MLJ 177, 182 (SC) held that the presumption is of course a rebuttable and optional presumption, based upon the common experience of mankind. It is inapplicable having regard to the facts and circumstances of each case, and especially the absence of objection from the party to whom such presumption could be detrimental.

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[29] In the present case, the documents were admitted and marked as exhibits. We fail to see in the judgment that the admissibility of those documents had been objected to by the plaintiff. In fact, Augustine Paul at p. 659 explained that any objection to the admissibility of secondary E evidence should be raised before it is admitted in evidence. In the circumstances of the present case, it is our considered view that presumption under s. 114(e) of the EA is applicable to those documents.

[30] In *Dow Jones Publishing Company (Asia) Inc v. Attorney General* [1989] 1 LNS 31; [1989] 2 MLJ 385 (CA) it was held that where the Minister acted F on powers under the Newspaper and Printing Presses Act to restrict the circulation of the plaintiff's publication, it can be presumed that any order he makes is valid until it is proved otherwise. In *Rengasamy Pillai v. Comptroller of Income Tax* [1970] 1 LNS 139; [1970] 1 MLJ 233 it was held that where a bankruptcy notice is issued by a Registrar it must be presumed, in the absence of evidence to the contrary, that the Chief Justice had duly G delegated his powers to the Registrar. In *Ho Hong Bank Ltd v. Ho Kai Neo* [1932] MLJ 76 it was held that a court in Johore should presume that a judgment obtained in Singapore was a binding judgment properly obtained. In *Mohd Nazir Badar Shair v. Timbalan Menteri Dalam Negeri & Ors* [2000] 2 CLJ 805; [2000] 2 MLJ 559 it was held that the signature of a Commissioner H of Oaths in an affidavit showing that it has been sworn before him is an official act and the affidavit must be presumed to have been regularly affirmed even though the jurat is on a completely new page unless the contrary is proved.

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[31] Similarly, in the present case, the order of Syariah Court of Appeal (D41) adjudicating that the marriage between the plaintiff and second defendant is not valid according to "syarak" must be presumed to have been made within the court's powers and is valid until it is proved otherwise. The Syariah Court of Appeal first sat on 22 June 1993 to allow parties to produce the letter from Kadi Daerah Barat Daya Pulau Pinang dated 30 June 1993 regarding the marriage between the plaintiff and the second defendant. It was then produced and after careful scrutiny of the said letter, the court found that the marriage had not been solemnised according to 'syarak'. The judicial act of the panel judges of the Court of Appeal had been regularly performed. The decision was conveyed to the Kadi Besar, Pejabat Kadi Negeri Kedah on 6 November 1993 and copied to Kadi Besar Pulau Pinang (D40). There is no evidence to suggest that the Syariah Court of Appeal order is a fraudulent document or has been falsified. The order remains valid until set aside.

[32] Further, the letter from the Syariah Judicial Department (D44) confirming the validity of D41 and supported by D40 must be presumed to have properly issued by the officer of the department and the endorsement made in the marriage certificate of the plaintiff and the second defendant (D45) that the marriage has been dissolved ("difaraqkan") based on the decision of the Syariah Court of Appeal must be presumed has been properly issued by the officer having such power to make such endorsement following the process. In our view, all this shows the existence of a fact which is likely to have happened which the court may presume by invoking s. 114(e) of the EA.

[33] Exhibit D42 which contains the endorsement that the marriage between the plaintiff and the second defendant has been dissolved ("difaraqkan") (D45) is a certified true copy. The critical question is whether the failure to object to the admissibility of an improperly certified document when it was tendered in evidence at the trial can be challenged on appeal. It was held that, where the mode of proof in respect of a document tendered as irregular or insufficient in the sense that it has been erroneously allowed to be proved in a manner different from which the law requires without objection, such objection cannot be taken at the appellate stage. The rationale underlying the rule is that the failure to object amounts to a waiver of the objection to the admissibility of the document. It amounts to an implied admission of the objection waived. An implied admission amounts to an express admission within the meaning of s. 58 of the EA (see *Evidence, Practice and Procedure*, 4th edn, Augustine Paul at pp. 727-728).

[34] In the circumstances of the above finding, we are satisfied there is sufficient evidence to show that the marriage between the plaintiff and the second defendant has been dissolved by judicial separation "difaraqkan" on 20 October 1993 based on the order of the Syariah Court of Appeal (D41) dated 24 August 1993.

A

Conclusion

[35] We find merit in the first defendant's appeal. It is our unanimous decision that the appeal should be allowed with costs of RM15,000 subject to allocator. We thus set aside the order of the High Court.

B

[36] The learned JC has ruled that the first defendant's counterclaim for defamation is dependent on whether or not the plaintiff's claim could succeed. If the plaintiff succeeds in his claim, the letter written by the plaintiff could not be defamatory to the first defendant on the basis of justification. Since we have allowed the appeal, we have also ordered that this case be remitted to the High Court for assessment of damages for the first defendant's counterclaim.

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